NO. 03-1160

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SIERRA CLUB APPELLEE

V.

CITY OF LITTLE ROCK APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION
THE HONORABLE JAMES M. MOODY

APPELLEE'S BRIEF

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SUMMARY OF THE CASE

The Sierra Club brought suit against the City of Little Rock ("City") and the Little Rock Sanitary Sewer Committee ("LRSSC") for violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq*., the City's National Pollutant Discharge Elimination System Storm Water Permit ("NPDES permit") issued pursuant to the Act, the LRSSC's NPDES permit, and the Resource Conservation and Recover Act ("RCRA"), 42 U.S.C. § 6901 *et seq*. The District Court found that the City had violated its NPDES permit by failing to prevent numerous discharges of untreated sewage from entering the City's storm sewer system. The Court also found that the LRSSC had violated the Clean Water Act by failing to prevent these discharges from entering directly into local rivers and streams.

Pursuant to 33 U.S.C. § 1365(d), the District Court awarded attorneys' fees to the Sierra Club, as the "prevailing party," against the City in the amount of $50,308.09 and against the LRSSC in the amount of $92,635.81.

The Sierra Club did not prevail on its claim that the City violated its Permit by failing to engage in comprehensive master planning to address storm water quality. The Court denied the City's request for an award of expert fees related to this issue because it determined that this claim was not frivolous or unreasonable.

Because the issues in this case are clear, and are fully addressed in each party's brief, oral argument is not necessary in this case.

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The Sierra Club brought the underlying action in the Federal District Court for the Eastern District of Arkansas pursuant to 28 U.S.C. § 1331, 33 U.S.C. § 1365(a), and 42 U.S.C. § 6972 (a)(1)(B).

On April 23, 2002, the District Court found the City in violation of its NPDES permit. On December 13, 2002, the District Court awarded attorneys' fees against the City pursuant to 33 U.S.C. § 1365(d) and denied the City's request for expert witness fees.

Appellants filed a timely notice of appeal on January 13, 2003. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES AGAINST THE CITY OF LITTLE ROCK IN THE UNDERLYING ACITON.

Farrar v. Hobby, 506 U.S. 103 (1992)

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II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE CITY OF LITTLE ROCK'S REQUEST FOR EXPERT WITNESS FEES.

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983)

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)

Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995)

STATEMENT OF THE CASE

On January 13, 2000, the Sierra Club filed suit against the City of Little Rock ("City") and the Little Rock Sanitary Sewer Committee ("LRSSC") alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq*., the City's National Pollutant Discharge Elimination System Storm Water Permit ("NPDES permit"), the LRSSC's NPDES permit and the Resource Conservation and Recover Act ("RCRA") 42 U.S.C. § 6901 *et seq*. (Appellant's Appendix "Applt. App." 24-36).

On March 5, 2001, the District Court granted the Sierra Club's motion for partial summary judgment against LRSSC and found that LRSSC had violated the Clean Water Act by failing to prevent discharges of untreated sewage (sanitary sewer overflows or SSOs) from entering into local rivers and streams. (Applt. App. 37-44). On September 12, 2001, the Sierra Club and LRSSC entered into a Consent Judgment and Settlement Agreement to address the remedies for the Clean Water Act and RCRA violations by the LRSSC. (Applt. App. 74-112). On November 16, 2001, the District Court entered judgment on liability against LRSSC (Applt. App. 72-73) and on February 14, 2001, Sierra Club filed its original Application for Attorneys' Fees against LRSSC. (Applt. App. 117-203).

On April 23, 2002, the District Court found that the City was in violation of its storm sewer NPDES permit by failing to prevent discharges of untreated sewage (sanitary sewer overflows) from entering the City's storm sewer system.

(Applt. App. 265-67). In addition, the District Court specifically retained jurisdiction over the case to ensure that the City complied with its storm sewer NPDES Permit and to resolve any problems that might arise. (Applt. App. 265). In the same order, the District Court denied the City's motion for summary judgment on the Sierra Club's claim that the City violated Part III, Section A(2) of its NPDES Permit by failing to engage in comprehensive master planning to address storm water quality. (Applt. App. 266). Following the District Court's ruling, the City agreed to fund the Settlement Agreement reached between LRSSC and the Sierra Club, and the Board of Directors for the City approved a forty-two per cent rate increase to support a $170 - $180 million wastewater improvement project. (Appellee's Appendix "App." 39-40).

After a bench trial held on August 26, 2002, the District Court determined that the City had not violated Part III, Section A(2) of its NPDES Permit related to comprehensive master planning. (App. 35).

On October 1, 2002, the Sierra Club filed a Supplement to Fee Application requesting attorneys' fees in the amount of $193,251.99. (Add-1). The Sierra Club requested $92,635.81 against LRSSC and $100,616.18 against the City. (Add-1). The Sierra Club limited its Fee Application against the City to time and expenses related to the untreated sewage issues and omitted all time and expenses related to the comprehensive master planning issue. (Applt. App. 418).

On September 24, 2002, the City filed a request for expert witness fees as the alleged prevailing party on the comprehensive planning issue. (Applt. App. 402-17).

On December 13, 2002, the District Court awarded attorneys' fees to the Sierra Club. (Add-1). The District Court granted the Sierra Club's entire request of $92,635.81 against the LRSSC. (Add-1). The District Court limited the Sierra Club's request related to the City, awarding only $50,308.09. (Add-1). The District Court denied the City's request for expert witness fees as the prevailing party on the comprehensive master planning process issue finding that the Sierra Club's claim regarding this issue was not frivolous or unreasonable. (Add-2). It is from these orders that the City appeals.

STATEMENT OF THE FACTS

The Sierra Club brought this action to prevent the continued violation of the Clean Water Act by the City and the LRSSC. For years, raw sewage has discharged from manholes and sewer lines in the Little Rock sanitary sewer system into the City's neighborhoods, parks, golf courses, streets, storm sewers, creeks, and rivers. (App. 66-92). The Sierra Club brought suit against both the LRSSC and the City to address the sanitary sewer overflows because each entity has critical powers and control necessary to remedy the problem. (Applt. App. 24-36 & Applt. App. 307-10). The LRSSC operates the sanitary sewer system and is the entity responsible for the NPDES Permit related to the sanitary system. (App. 99-102). However, the City owns the sanitary sewer system, appoints all the members of the LRSSC, and retains the sole power to enact ordinances necessary for the LRSSC to implement critical programs. (App. 99-102 & Applt. App. 307-10). Most importantly, any rate increase or bonded financing related to the sanitary sewer system must be approved by the City. (App. 99-102).

In the underlying action, the District Court granted the Sierra Club's motion for partial summary judgment against LRSSC and found that LRSSC had violated the Clean Water Act by failing to prevent sanitary sewer overflows ("SSOs") from entering into local rivers and streams. (Applt. App. 265). On September 12, 2001, the Sierra Club and LRSSC entered into a Consent Judgment and Settlement

Agreement to address the remedies for the Clean Water Act and RCRA violations by the LRSSC. (Applt. App. 74-112). On November 16, 2001, the District Court entered judgment on liability against LRSSC. (Applt. App. 72-73).

Additionally, in the underlying action, the City admitted that at least 118 sanitary sewer system overflows had discharged into the City's storm sewer system. (App. 63-92). Because the City's storm sewer NPDES Permit explicitly required the City to prohibit the discharge of raw sewage overflows into the City's storm sewer system, these incidents constituted 118 separate violations of the City's storm sewer permit and the Clean Water Act. On April 23, 2002, the District Court, therefore, found the City to be in violation of its NPDES Permit. (Applt. App. 265). The District Court retained jurisdiction over this matter to ensure that the City came into compliance with the Clean Water Act. (Applt. App. 265).

Following, the District Court's order in April 2002, the City agreed to fund the Settlement Agreement entered into by the LRSSC and the Sierra Club. (App. 39-40 and Applt. App. 99). In addition, on September 17, 2002, the City approved a forty-two per cent rate increase to support a $170 - $180 million wastewater improvement project to cure many of the defects identified by Sierra Club in the underlying lawsuit. (App. 39-40).

As a separate but related claim, the Sierra Club alleged that the City had violated its Storm Sewer Permit by failing to plan properly for the future of Little Rock, particularly in areas of new development. (App. 3-9). Part III, Section A(2) of the City's Storm Sewer Permit requires the City to, among other tasks, develop and implement a "comprehensive planning process" designed to limit storm water runoff in areas of new development and undertake adequate annual reviews of its storm water quality management program to ensure that it is effective. (App. 3-9). The Sierra Club alleged that the City had failed to comply with this permit requirement. (App. 3-9).

The District Court denied the parties' cross-motions for summary judgment on the comprehensive master planning claim (Applt. App. 265-66) and this issue went to trial on August 26, 2002. Following the trial, the District Court found for the City. (App. 35).

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion in awarding attorneys' fees to the Sierra Club against the City of Little Rock in the underlying action. Pursuant to 33 U.S.C. § 1365(d), the prevailing party in a citizen enforcement suit is entitled to attorneys' fees. Because the District Court specifically found that the City was in violation of its NPDES permit, the District Court correctly determined that the Sierra Club was the prevailing party and awarded attorneys' fees. This Court should affirm the District Court's Order.

The District Court did not abuse its discretion in denying the City's request for expert witness fees pursuant to 33 U.S.C. § 1365(d). Although the City contends that as the alleged prevailing party with regard to the comprehensive planning issue, it is entitled to such fees, the City is only entitled to fees pursuant to this statute if the Sierra Club's claim was frivolous, unreasonable, or without foundation. The District Court specifically held that this claim was not frivolous or unreasonable. Therefore, the City is not entitled to attorneys' fees pursuant to 33 U.S.C. § 1365(d), and this Court should affirm the District Court's order.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCREITON IN AWARDING ATTORNEYS' FEES AGAINST THE CITY OF LITTLE ROCK IN THE UNDERLYING ACTION.

Pursuant to 33 U.S.C. § 1365(d), the District Court awarded attorneys' fees to the Sierra Club against the City of Little Rock in the amount of $50,308.09. (Add-1). This provision of the Clean Water Act plainly vests the trial judge with the broad discretion to award attorneys' fees to a prevailing party or substantially prevailing party if it determines that these fees are appropriate. Section 1365(d) provides, "the court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." Because the decision to award attorneys' fees lies in the sole discretion of the trial judge, see *Jones v. City of St. Clair*, 804 F.2d 478, 481-82 (8th Cir.1986), absent an abuse of discretion, an award should not be reversed. See *Armstrong v. Asarco*, 138 F.3d 382, 387 (8th Cir. 1998). Because the District Court did not abuse its discretion in awarding attorneys' fees against the City, the District Court's Order should be affirmed.

A. Sierra Club is a Prevailing Party under 33 U.S.C. § 1365(d).

The District Court found that the Sierra Club was the prevailing or substantially prevailing party entitling it to attorneys' fees pursuant to 33 U.S.C. §

1365(d). (Add-1). This Court reviews such a finding *de novo*. See *Armstrong v. Asarco, supra*. Because the Court was correct in its determination, this Court should affirm the District Court's Order.

The City contends that the Sierra Club is not a prevailing or substantially prevailing party under the Clean Water Act, 33 U.S. C. § 1365(d) because the only form of relief which the Sierra Club was successful in obtaining against the City was the declaration that the City violated its NPDES permit by failing to prevent untreated sewage from entering into the storm sewer system. Appellant's Brief at 11. The City contends that because there was no alleged change in the legal relationship between the Sierra Club and the City, the Sierra Club should not be considered a prevailing party. Appellant's Brief at 11. In doing so, the City ignores not only the judicial declaration by the District Court but also ignores that: (a) the District Court specifically retained jurisdiction over this case to ensure the City's compliance with the Clean Water Act, (Applt. Add. 265), and (b) following the District Court's declaration and while it retained jurisdiction, the City chose to fund the substantive components of the Settlement Agreement entered between the Sierra Club and the LRSSC, and the City approved a forty-two per cent rate increase to support the $170 - $180 million wastewater improvement project necessary to cure many of the defects identified by the Sierra Club in the underlying lawsuit. (App. 39-40).

The trial court has the duty to analyze the type of relief received by the alleged "prevailing party." In doing so, courts look at "what the lawsuit originally sought to accomplish and what relief actually was obtained[,] . . . an inquiry into the practical outcome realized." *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717, 719 (9th Cir. 1991) (internal citations omitted). The focus of this inquiry must be "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Dague v. City of Burlington*, 935 F.2d 1343, 1357 (2nd Cir. 1991). Specifically, with regard to the CWA, in determining whether or not the relief that was sought by the plaintiff was obtained, it has been stated that "[p]revailing must be read in light of the goals of the Clean Water Act . . and that it [is] appropriate for courts to award fees to partially prevailing parties where the action served to promote the purposes of the Act." *Idaho Conservation League, Inc. v. Russell*, 946 F.2d at 720 (internal citation omitted). The congressional history of the fee shifting provisions in the CWA "indicate[s] that they were enacted to encourage litigation and to ensure proper administrative implementation of the environmental statutes." *National Wildlife Federation v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988).

The Second Circuit Court of Appeals was presented with this issue in *Dague v. City of Burlington*, 935 F.2d 1343, 1357 (2nd Cir. 1991). In that case, the relief obtained by the plaintiffs was a determination by the district court that the city had

violated certain provisions of the CWA and the RCRA. *Id.* at 1358. The district court awarded the plaintiffs attorneys' fees as prevailing parties. *Id.* at 1356. The city challenged this award contending that the plaintiffs were not prevailing parties because their success was purely technical and *de minimis*. *Id.* at 1357. The Second Circuit held that the district court had correctly characterized the plaintiffs as the prevailing party. *Id.* at 1358. The Court stated that the judicial determination "constitute[d] a change in the legal relationship between the parties" sufficient to confer the status of a prevailing party on the plaintiffs. *Dague*, 935 F.2d at 1358. "The plaintiffs did prevail in this action within the federal statutory definition because, in large part, it was the pressure generated by the plaintiffs' efforts here that caused the city to actually close the landfill." *Id.* at 1357.[1] The same situation is present in the instant case.

As previously referenced, on September 17, 2002 -- after the District Court found the City in violation of its Permit and during the period that the District Court retained jurisdiction to ensure the City's compliance with the Act -- the City approved a forty-two per cent rate increase to support a $170 - $180 million wastewater improvement project to cure many of the defects identified by Sierra

[1] The United States Supreme Court granted certiorari "only with respect to the propriety of the contingency enhancement." *City of Burlington v. Dague*, 505 U.S. 557, 560 (1992). The finding that the plaintiff was a prevailing party was neither discussed or disturbed.

Club in the underlying lawsuit. (App. 39-40). The Board of Directors approved the rate increase only after the District Court handed down its ruling in the underlying case. Additionally, it has been noted that the problems in Little Rock's sewer system had gone unnoticed before the filing of this lawsuit by the Sierra Club in January of 2000. (App. 39-40). It has also been stated that the Sierra Club's favorable ruling in this lawsuit actually forced the City to action, "as many other cities have been forced to upgrade their wastewater systems, some cities, such as LR, have been forced [in]to action by lawsuits by environmental groups." (App. 39-40).

Therefore, with regard to the "practical outcome realized," simply the size of the rate increase passed by the City evidences its own significance. The City had deferred funding of maintenance on the sanitary sewer system for a number of years. (App. 39-40). The wastewater improvement project was implemented to cure the defects identified by the Sierra Club in the underlying lawsuit. (App. 39-40). Such a significant shift in the City's conduct cannot be considered *de minimus.*

Moreover, following the District Court's judicial declaration that the City was in violation of the Clean Water Act, and while the Court retained jurisdiction of the case, the City was compelled to fund the Settlement Agreement between the LRSSC and the Sierra Club. (Applt. App. 99 & Applt. App. 307-10). Therefore,

there has been a significant change in the status quo as a result of the judicial determination made by the District Court. Although the City now attempts to categorize this relief as purely technical, the actual events impeach this characterization. Therefore, it is disingenuous of the City to contend that the results obtained by Sierra Club were *de minimus.*

B. A Fee Award is Appropriate in this Case.

Additionally, a fee award is appropriate in this case because the Sierra Club has "contributed substantially to the goals of the act." *Abrowitz v. United States E.P.A.*, 832 F.2d 1071, 1079 (9th Cir. 1987) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). The City, again, attempts to characterize the Sierra Club's success in this case as nominal and only a "moral" victory. Appellant's Brief at 21. As shown above, the City has mischaracterized the Sierra Club's success in this suit. Regardless, under the CWA, a court is allowed to award attorneys' fees to any party, "whenever the court determines such an award is appropriate." 33 U.S.C. § 1365 (d). Although it is necessary that the party be the prevailing or substantially prevailing party, the CWA leaves fee awards to the discretion of the court. The legislative history of the CWA shows that attorneys' fees may be awarded to those parties "who *prevail in part* as well as those who *prevail in full*." *Avoyelles Sportsmen's League, et al., v. Marsh*, 786 F.2d 631, 634 (5th Cir. 1986) (emphasis in original) (internal citation omitted).

An attorneys' fee award is "appropriate" when the moving party has obtained some success on the merits and has contributed substantially to the goals of the statute in doing so. *Western States Petroleum Association v. E.P.A.*, 87 F.3d 280, 286 (9th Cir. 1996). The goal of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a). Pollution control is precisely Sierra Club's mission as an organization and as the plaintiff in the underlying action against the City.

Further, the Supreme Court has analyzed the "when appropriate" language in the context of a Clean Air Act and stated, that the when appropriate standard "was meant to expand the class of parties eligible for fee awards from prevailing parties, to partially prevailing parties -- parties achieving some success, even if not a major success." *Ruckelshaus v. Sierra Club*, 463 U.S 680, 688. In addition, the standard eliminates the necessity of further scrutiny by the courts into the nature of the success. *Id.* More recently, the Eleventh Circuit Court of Appeals stated that "Congress intended that a plaintiff whose suit furthers the goals of a ["whenever appropriate"] statute be entitled to recover attorney's fees." *Loggerhead Turtle v. The County Counsil of Volusia County, Florida*, 307 F.3d 1318, 1325 (11th Cir. 2002) (internal citations omitted).

The District Court in this case exercised the broad discretion that it is afforded under the CWA and awarded the Sierra Club attorneys' fees because such

fees are "appropriate." First, the Sierra Club did succeed on the merits in this suit. The District Court found that the City was in violation of the law and made a judicial declaration stating precisely that. (Applt. App. 265). Further, attorneys' fees are appropriate although the Sierra Club did not prevail on all of its claims. Because it is undisputed that the Sierra Club did achieve some success on the merits, the Court does not have to inquire any further into the nature of the success.

Second, it is evident from the actions taken by the City following the Court's declaration and during the time period that the Court retained jurisdiction to ensure the City's compliance with the CWA that the goals of the CWA have been furthered. The City has now approved the funding of a sanitary sewer improvement plan that will correct many of the deficiencies identified by the Sierra Club in this suit that had previously been ignored by the City. (App. 39-40). The City has also implemented a $170 million wastewater project and has raised Little Rock residents' rates by over forty per cent. (App. 39-40). It is patently obvious that the District Court's ruling has had a huge impact on the public and the residents of the City of Little Rock.

In addition, the City funded the Settlement Agreement entered into between the Sierra Club and the LRSSC. (App. 39-40 & Applt. App. 99). Absent the judicial declaration by the District Court, the City would not have been compelled to do so. (Applt. App. 307-10).

Therefore, fee awards are more than appropriate in this case. The Sierra Club has received a judicial declaration that directly benefits it and substantially further the goals of the CWA. Because the District Court has broad discretion to award fees, the order of the District Court should be affirmed.

C. The City is Responsible for a Portion of the Payment of the Fees and Costs.

The City argues that the Sierra Club obtained all of its remedy regarding sanitary sewer overflow from LRSSC through the Settlement Agreement between the Sierra Club and LRSSC, and, therefore, the City is not responsible for the payment of any fees. Appellant's Brief at 12. In doing this, the City completely ignores the fact that the District Court issued a judicial declaration that the City was in violation of the law and that the Court explicitly stated that it was going to retain jurisdiction of the case to ensure that the City complied with the law in the future. (Applt. App. 265).

Equally important, the City also ignores the fact that in order to truly be successful in this case, it was necessary that the Sierra Club prevail against both the LRSSC and the City. Although the LRSSC is responsible for compliance with the NPDES Permit related to the sanitary sewer system, the LRSSC and the City actually *share* legal responsibility for, and practical control over, the sanitary sewer system. (App. 99-102 & Applt. App. 307-10). The City delegated to the LRSSC certain responsibilities relating to the operation and management of the sanitary

sewer system pursuant to City of Little Rock Ordinance No. 5,251 (June 10, 1935). (App. 99-102). However, in addition to the fundamental power to withdraw such delegation at any time, the City has retained critical control over the system. (App. 99-102). For example, the City owns the sanitary sewer system, appoints all the members of the LRSSC, and retains the sole power to enact ordinances necessary for the LRSSC to implement critical programs. (App. 99-102). Most importantly, the City controls the LRSSC's purse strings -- any rate increase or bonded financing must be approved by the City. (App. 99-102 & Applt. App. 307-10). Therefore, to the extent that any improvements, rehabilitation, repairs and/or programs to eliminate sanitary sewer overflows require a rate increase or bonded financing, the LRSSC cannot undertake such actions without City approval. (App. 99-102). Finally, the City has a separate legal duty to control sanitary sewer overflows under the provision of its NPDES Permit that the District Court ruled it has violated. (App. 99-102 & Applt. App. 307-10).

Because both entities have separate legal duties to address the SSO problem under their respective NPDES permits *and* separate legal powers for addressing that problem under Federal, Arkansas and local law, the City and LRSSC must cooperate in good faith to remedy the SSO problem. The Sierra Club and the LRSSC recognized the critical role the City must play in their Settlement Agreement, which provides, "LRSSC agrees to use its best efforts to meet the

deadlines set forth herein and expressly acknowledges that monetary cost shall not be an excuse for failing to meet the deadlines set, unless LRSSC's good faith effort to obtain any rate increase or bonded financing necessary to fund the Program is denied by the Board of Directors of the City of Little Rock." (Applt. App. 99).

In short, true success in this lawsuit was dependent upon victories against both the LRSSC and the City. With the Consent Judgment and Settlement Agreement with the LRSSC, the Sierra Club obtained the substantive components and judicially enforceable deadlines needed to remedy the sanitary sewer problems. With the District Court's declaration against the City and retention of jurisdiction, the Sierra Club was ensured the $170-180 million in funding necessary to implement the substantive components of the Settlement Agreement by the mandatory deadlines.

Because it is undisputed that Sierra Club obtained a judicial declaration finding the City in violation of the law, and the District Court maintained jurisdiction to ensure that the City complied with the law, it is clear that Sierra Club did obtain a portion of their remedy from the City. (Applt. App. 265). Moreover, because it was necessary for the Sierra Club to obtain judicial relief from the District Court in order to compel the City to fund the Settlement Agreement made between the LRSCC and the Sierra Club, it is clear that the Sierra

Club did not obtain all of its remedy from LRSSC. (Applt. App. 307-10). To state otherwise is a misstatement of the facts in this case.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING EXPERT WITNESS FEES TO THE CITY OF LITTLE ROCK.

In the underlying action, the City sought expert witness fees as the prevailing party on the comprehensive master planning ("CMP") issue pursuant to 33 U.S.C. § 6505(d). (Applt. App. 414-21). The District Court denied the City's request. (Add-2). Because this Court should not reverse a district court's denial of attorneys' fees absent an abuse of discretion, the order of the District Court should be affirmed. See *Comfort Lake Ass'n, Inc. v. Dresel Contracting*, Inc., 138 F.3d 351, 353 (8th Cir. 1998).

In support of its argument, the City contends that prevailing defendants are entitled to an award of attorneys' fees under Section 505(d) of the Clean Water Act, just as prevailing plaintiffs are entitled to such an award. Appellant's Brief at 26. However, the City ignores the extensive case law on this issue from the Supreme Court, other circuits, and numerous district courts. A review of that law makes clear that the City is not entitled to an award of expert witness fees in this case because the CMP claim was not frivolous or without foundation.

The seminal case on this issue is *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), in which the Supreme Court held that while prevailing plaintiffs

in Title VII cases "should ordinarily recover an attorney's fee," *id*. at 416, prevailing defendants in such cases may recover fees only if they can show that "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id*. at 421. The Court emphasized that "meritless is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." *Id*. (internal citation omitted).

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success . . . .

Id. at 421-22.

The Supreme Court explained that the reasons why a prevailing defendant must meet a stricter standard than a prevailing plaintiff, noting "at least two strong equitable considerations" warranting awards to a prevailing plaintiff that are "wholly absent" in the case of a prevailing defendant. *Christiansburg Garment Co.*, 434 U.S. at 418. First, a plaintiff is the "chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority." *Id*. (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)) (internal citations omitted). "Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Christiansburg Garment Co.*, 434 U.S. at 418.

In *Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air*, 478 U.S. 546, 560 (1986), the Supreme Court held that "[g]iven the common purpose of both §304(d) [of the Clean Air Act] and §1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorneys fees in the same manner." In *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1980), the Supreme Court held that section 304(d) of the Clean Air Act is identical to section 505(d) of the Clean Water Act and fee provisions in twelve other environmental statutes and that the standards for awarding fees and costs under all these environmental statutes are identical. It follows that the *Christiansburg* standard should be applied to fee awards to prevailing defendants under all environmental statutes, including the Clean Water Act.

The legislative history of section 505(d) of the Clean Water Act also supports the application of the *Christiansburg* standard to fee awards under the Clean Water Act. Congress sought to encourage citizens' suits under the Clean Water Act by allowing successful plaintiffs to recover litigation costs. Congress also sought to discourage frivolous claims by allowing courts to award fees to defendants where the plaintiff's claim was frivolous. S. Rep. No. 414, 92nd Cong., 1st Sess. 81 (1971) *reprinted at* 1972 U.S. Code Cong. & Admin. News 3668, 3747. These same congressional goals motivated passage of the fee-shifting

provisions in the employment discrimination context that was the subject of *Christiansburg*. See *Christiansburg Garment Co.*, 434 U.S. at 420.

Every court in the country that has considered a fee request by a prevailing defendant in an environmental citizen suit has applied the stringent *Christiansburg* standard and denied a fee award. In *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995), the Ninth Circuit held that the *Christiansburg* standard applies to fee awards to prevailing defendants in citizen suits under the Clean Water Act and the Resource Conservation and Recovery Act ("RCRA"). Federal district courts also have routinely applied a "frivolous" or "meritless" standard and have uniformly denied requests by prevailing defendants for fees and costs in citizen suits under the Clean Water Act. See *Morris-Smith v. Moulton Niguel Water District*, 44 F. Supp. 2d 1084, 1086 (C.D. Cal. 1999); *Atlantic States Legal Foundation v. Onondaga Department of Drainage and Sanitation*, 899 F. Supp. 84, 87 (N.D.N.Y. 1995); *Washington Trout v. Scab Rock Feeders*, 823 F. Supp. 819, 821 (E.D. Wash. 1993); *National Wildlife Federation v. Consumers Power Co.*, 729 F. Supp. 62, 64 (W.D. Mich. 1989). At least one district court has applied a "frivolous or harassing" standard and denied a request for attorneys' fees by a prevailing defendant in a citizen suit under the Clean Air Act. See *Consolidated Edison Co. v. Realty Investment Assoc.*, 524 F. Supp. 150, 153 (S.D. N.Y. 1981). Courts also have denied fees to prevailing defendants in RCRA

citizen suits based on findings that the suits were not frivolous. See *Marbled Murrelet v. Babbitt*, 182 F.3d 1091 (9th Cir. 1999).

Moreover, in many of these cases defendants that have prevailed early in the stages of litigation are denied an award of attorneys' fees. For example, in *Morris-Smith v. Moulton Niguel Water Dist.*, *supra*, the Court granted summary judgment in favor of the defendants on the plaintiff's claim for violations of the Clean Water Act but denied the plaintiff's request for attorneys' fees. See *Morris-Smith*, 44 F. Supp. 2d at 1085. The Court specifically found that because the action was not "frivolous," an award of attorneys' fees was not warranted. *Id*. at 1086. In addition, in *Washington Trout v. Scab Rock Feeders*, *supra*, a defendant that was successful in dismissing an action based on alleged violations of the Clean Water Act was denied attorneys' fees as a prevailing party. See *Washington Trout*, 823 F. Supp. at 821. The Court found that because the claim was not "unreasonable or vexatious," the defendant was not entitled to attorneys' fees. *Id.*

The City claims that because the District Court held that it had not violated its permit regarding the planning process issue, the Sierra Club's claim regarding this issue was without merit from the beginning of the lawsuit. Appellant's Brief at 12. However, the District Court below specifically stated that although the Sierra Club "was not ultimately successful on its claim regarding the comprehensive

master planning process, the claim was not frivolous, unreasonable or without foundation." (Add-2).

Moreover, the Sierra Club successfully defeated a motion for summary judgment on this claim earlier in the underlying action. (Applt. App. 266). Therefore, compared to the cases cited above, it is even more unlikely that the City in this case is entitled to fees as prevailing party.

In addition, courts have held that "where at least some of a plaintiff's claims were sufficient to survive summary judgment," the claims "were not frivolous or litigated in bad faith, as would warrant award of costs and fees to defendants." *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 677 (5th Cir. 2001). See also *In re Frank Funaro, Inc.*, 263 B.R. 892, 896 (B.A.P. 8th Cir. 2001) (stating that if a lower court denies a motion for summary judgment on a claim thereby finding that genuine issues of material fact exist, it is error for that Court to later hold that the claim raised was wholly without merit and frivolous). Here, the Sierra Club prevailed against the City and the LRSSC on their primary claims related to sanitary sewer overflows. (Applt. App. 265).

Further, the comprehensive planning process claim brought by the Sierra Club was based upon the language contained in the Clean Water Act, the Environmental Protection Agencie's regulations and guidance, and experiences in other localities. (App. 107-50). This was an issue of first impression for the

District Court below. An overview of this issue can be found in the Transcript of Trial, pages 16-44. (App. 107-50). Because this argument was based on sound legal arguments, factual foundation, and environmental policy, it should not be considered unreasonable or frivolous.

Based upon the above-stated reasons, the District Court did not abuse its discretion in denying the City's request for expert witness fees. Therefore, the District Court's Order should be affirmed.

III. CONCLUSION

For the reasons previously stated, the Sierra Club respectfully requests that this Court affirm the Orders of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that on this the ___ day of April, 2003, a true and correct copy of this pleading both in hard copy and in electronic format by diskette was sent by regular mail to Beth Blevins Carpenter, Deputy City Attorney, City Hall, Suite 310, 500 West Markham, Little Rock, Arkansas 72201.

In addition, pursuant to Local Rule 28A, I, Sarah M. Priebe, hereby certify that this brief has been saved in word processing software denominated Microsoft Word XP, and that each diskette served concurrently with the brief to opposing parties and to the Court Clerk has been scanned and is virus-free.

Further, I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,676 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), pursuant to the word count feature in Microsoft Word XP.

_____

Sarah M. Priebe

ADDENDUM